IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

SILVER CREEK DRAIN DISTRICT,
a statutory body corporate,

Plaintiff/Appellant,

Supreme Court Docket No. 119721

v.

EXTRUSIONS DIVISION, INC.,
a Michigan corporation and AZZAR
STORE EQUIPMENT, INC., a
Michigan corporation,

Defendants/Appellees,

Consolidated With:

EXTRUSIONS DIVISION, INC.,
a Michigan corporation,

Plaintiff,

v.

CITY OF GRAND RAPIDS, a Municipal
Corporation, and KENT COUNTY DRAIN
COMMISSIONER, jointly and severally,

Defendants.

PLAINTIFF/APPELLANTS' REPLY BRIEF
ORAL ARGUMENT REQUESTED

Matthew Zimmerman (P33296)
Mark S. Allard (P38164)
Attorneys for Plaintiffs/Appellants
Silver Creek Drain District and
Kent County Drain Commissioner
Bridgewater Place/P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

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INTRODUCTION

The bulk of Appellee's Brief on Appeal is an attempt to justify the Court of Appeals' erroneous interpretation of the Uniform Condemnation Procedures Act, MCLA 213.51 *et seq.* ("UCPA"). Appellee even invented a tag line for the 1993 amendments to the UCPA that related to condemnation procedures where the subject property is contaminated. Simply summarizing the amendments as a "reservation/waiver/escrow scheme," however, does not take the place of a complete and honest analysis of the amendments. Appellee attempted to explain one portion of the 1993 UCPA amendments as it relates to Appellant's analysis, but did not even address four other provisions of those amendments which cannot be reconciled to Appellee's interpretation. Appellant addressed each of those in its Brief on Appeal and will not repeat that here. In addition, Appellee's policy rationale for its interpretation of the 1993 UCPA amendments falls well short of the mark. Appellee neglected to discuss the fundamental problem caused by environmentally contaminated property which led to the four bill brownfield redevelopment package of which the 1993 UCPA amendments were a part. Finally, Appellee completely misconstrued the applicability of the 1993 amendments to pre-1993 takings, which might well be the situation in this case if Appellee is successful in its still-pending 1992 inverse condemnation case.

RESPONSE TO APPELLEE'S COUNTER-STATEMENT OF FACTS

Several of the factual statements contained in Appellee's Counter-Statement of Material Facts and Proceedings are inaccurate. Other factual allegations are based on references to the record that are taken out of context or are incorrect legal conclusions based on stipulated facts.

Appellee characterizes the environmental contamination of Old South Field as "minor", "quite low" and "well within these new [post-June 1995] limits." Appellee-Brief on Appeal, pp.

7-8. Based on the liability scheme and cleanup criteria that were in place in 1994, the contamination was very real and significant from the standpoint of a reasonably prudent purchaser. Both environmental experts recognized this and both indicated that a reasonably prudent purchaser would have required significant reductions in the purchase price of the property in order to reflect the presence of the contamination. Trial Transcript, Vol. III. 64-65 and Vol. IV. 25; Appellant's Appendix, 110a-112a, and 126a.

Appellee argues that Extrusions would have had available to it the "innocent landowner" defense under CERCLA, and asserts that the parties had stipulated to that. Appellee-Brief on Appeal, p. 9, ft. nt. 5. While both of these assertions are incorrect[1], Appellee missed the point concerning just compensation. The value of contaminated property in the marketplace does not depend upon whether the seller is liable or not, but on whether the purchaser would have liability. In 1994, contamination of Old South Field was public knowledge (Extrusions itself had asserted this fact in public documents as part of its appeal of its 1989 and 1990 real estate taxes). Thus, the "innocent landowner" defense under CERCLA would not have been available. It requires that the purchaser at the time of acquisition "did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." 42 USC § 9601(35)(A)(i); Appellee's Addendum of

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[1] The third party defense set forth at 42 USC 9607(3)(b) provides a defense to those damages "caused solely by the act or omission of a third party." In spite of the Appellee's assertions, *US v Cordova Chemical Company of Mich*, 113 F3d 572, 583 (6th Cir 1998) does not relieve a current owner or operator of contaminated property from liability under CERCLA. See 42 USC 9607(a)(1). Appellees have failed to recognize that Extrusions was already subject to strict liability as the current owner and operator of the contaminated property as of the date of the take, and thus, the third party defense was not applicable then. Similarly, any prospective purchasers would also incur strict liability as an owner or operator of the subject property. Finally, for these reasons, the stipulated facts that Appellee referenced in its brief at p. 9 ft. nt. 5, do not equate to an agreement that Appellee qualified for the "innocent landowner" defense at the time of the take.

Exhibits, Exhibit E. As a reasonably prudent purchaser in 1994 would have recognized his or her liability for the contamination of Old South Field (as Appellee even recognized in the opening paragraph of its brief), he or she would have factored the cost of that liability into the value of the property. Extrusions' liability is irrelevant.

Finally, Appellee cites the Appraisal Standards Board as stating that the value of contaminated property "may not be measured by simply deducting the remediation or compliance cost estimate from the estimated value as if unaffected." Appellee Brief on Appeal, p. 12. Appellee attached Advisory Opinion 9 (AO-9), Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice* (The Appraisal Foundation, 2000) as Exhibit H in its Addendum. The very next sentence of that Opinion reads "other factors may influence value, including any positive or negative impact on marketability (stigma) and the possibility of change in highest and best use." *Id.* In other words, the true market value of contaminated property might actually be lower than the value as clean minus the estimated cost to remediate it to appropriate state or federal standards. Moreover, the Opinion provides that "an appraiser may reasonably rely on the findings and opinions of qualified specialists in environmental remediation and compliance cost estimation." *Id.* That is exactly what Appellant's appraiser, and ultimately the Circuit Court, did in determining fair market value of Old South Field. *See*, Trial Transcript, Vol. III, pp. 39, 63, 153-154; Appellant's Supplemental Appendix, 173a-176a. Thus Appellee's statement that no proofs were submitted dealing with cleanup standards being applied to similar properties is simply not true. *Id.* Appellee Brief on Appeal, p. 11.

ARGUMENT

The majority of Appellee's argument in its Brief on Appeal involves its analysis of the 1993 UCPA amendments. Appellee's interpretation makes sense from statutory interpretation,

constitutional and policy standpoints only when it is applied to situations where the agency reserves its right to bring a cost recovery action against the owner. When the condemning agency waives such cost recovery action, then the proper statutory construction of the UCPA, the Michigan Constitution, and common sense mandate that the agency be allowed to introduce evidence of environmental contamination at the valuation trial.

I. THE COURT OF APPEALS INCORRECTLY INTERPRETED THE 1993 UCPA AMENDMENTS BECAUSE IT CONFUSED A COST RECOVERY ACTION WITH ESTABLISHING THE FAIR MARKET VALUE OF CONTAMINATED PROPERTY.

Appellee puts the 1993 UCPA amendments into a nice, neat box which it calls the "reservation/waiver/escrow scheme". Appellee Brief on Appeal, p. 19. As Appellee notes, the 1993 UCPA amendments were part of a four bill brownfield redevelopment package. What Appellee neglects to mention, however, is that the primary need for such a package of bills was the fact that there were large numbers of contaminated properties in urban areas in Michigan that sat vacant and valueless because of their environmental contamination. *See*, Legislative History, Appellee's Addendum of Exhibits, Ex. I. Developers were not buying these properties because of the environmental liability that attached to them. The State was unable to force their remediation because the liable parties either could not be identified or were bankrupt, insolvent or otherwise financially unable to conduct the remediation. Even the State did not have the resources to carry out the remediation of all such properties. Legislation was therefore needed to reduce the risk to parties that wanted to redevelop these urban sites and help avoid the loss of farmland, the spread of urban sprawl and related problems that result from the inability to utilize urban brownfield sites. *Id.* In light of this background, a statutory interpretation of the 1993 UCPA amendments that forces a condemning agency to pay in excess of fair market value for

contaminated property and provides an owner of such property with a windfall should be viewed with enormous skepticism.

On the other hand, a simple qualification of Appellee's interpretation of the 1993 UCPA amendments allows it to give meaning to all of the provisions of the amendments, makes it constitutional and make common sense. Where the agency reserves its rights to bring a cost recovery action against an owner, then Appellee's analysis is valid. Evidence of environmental contamination should not be allowed at the just compensation portion of the condemnation trial in such case as that would unjustly enrich the agency that succeeds in its cost recovery action.

The primary purpose behind the 1993 UCPA amendments was to allow an agency to leave the estimated just compensation in escrow when the subject property was contaminated. *Id.* The remaining provisions were added as a safeguard against the situations where the response activity exceeds the value of the property in the marketplace as contaminated. *Id.* In other words, the legislature provided agencies with the protection afforded by the retention of the just compensation in escrow, but in fairness required the agency to declare in advance whether it would reserve or waive its cost recovery rights against the property owner. *Id.* Where it waives such rights, then the **only** forum in which the environmental contamination can be analyzed is the just compensation portion of the condemnation action. *Id.* It is absurd to think that the Legislature, in a brownfield redevelopment bill, would have precluded this right.

Appellee argues that courts or juries will not be able to make a rational valuation decision in a just compensation case under the Drain District's approach. Again, the present case belies such an argument. At the just compensation trial in this case, both parties presented environmental experts who had thoroughly investigated the environmental condition of the property. Each had an abundance of environmental data to rely upon. Each had prepared reports

following their analysis of various remedial strategies for the site. Each was deposed in advance of trial. Each presented two separate remedial strategies that reasonably prudent purchasers in 1994 would have followed in response to contaminated property. The trier of fact was able to make a reasoned decision based on empirical evidence and expert opinions. This is no different than any tort action in which current and future damages have not been quantified but for which expert testimony is given at trial.

Additionally, Appellee's interpretation of the 1993 UCPA amendments cannot make sense of section 6a of the UCPA, MCLA 213.56a. Nor does Appellee's interpretation overcome the constitutional problem presented by an agency's inability to introduce evidence of environmental contamination against a non-liable property owner thus forcing the agency to pay in excess of fair market value. These problems are overcome by limiting the reservation/waiver/escrow approach to situations where the condemning agency has reserved its rights to bring cost recovery action.

Finally, Appellee was not even able to muster a response to the Drain District's demonstration as to how the 1993 amendments to the UCPA, when read together, invalidate Appellee's interpretation. *See,* Appellant's Brief, §II. Appellee did not address the portion of section 5(l) requiring the agency's appraisal to reflect the reservation or waiver of cost recovery and providing the right to resubmit a good faith offer for certain pre-1994 cases, nor section 8(2)(a) involving statutory remediation changes, nor section 8(4) involving returning an escrow balance to the agency. *Id,* § II. C. None of these provisions make sense in Appellee's theory, which is why Appellee did not address them.

II. THE SCHEME OF THE PROCEDURAL STATUTE AT ISSUE DEMONSTRATES THE LEGISLATURE'S INTENT TO ACCOUNT FOR ENVIRONMENTAL CONTAMINATION IN DETERMINING THE FAIR MARKET VALUE OF PROPERTY.

With respect to the UCPA, Appellee ignores the logical reading of this *procedural* act. The intent of the Legislature is evident in the very statutory provisions cited by Appellee. For instance, Appellee argues that, under MCL 213.56a, a Court's reversal of a reservation of the right to bring a cost recovery action "simply requires that the notice given to the property owner be amended to reflect that fact." This contention, however, significantly understates both the requirements of the statutory provision and its obvious intent.

Specifically, MCL 213.56a(2) provides that where a court reverses the condemning authority's reservation of the right to a cost recovery action, then the condemning authority **shall** revise its good faith offer. This revision is required so that the condemning authority can adjust its offer to take the environmental contamination into account. *Id.* There is no other valid explanation for allowing a revised good faith offer.

The logical extension of Appellee's argument relating to the "homeowner/farmer protections" of MCL 213.56a(1) further demonstrates the error of Appellee's underlying premise; the fact that a homeowner may avoid liability for the actual contamination does not mean that the contamination is not considered in determining the fair market value of the home in a transaction between a willing seller and a willing buyer. For instance, under Appellee's theory, if a homeowner's well is contaminated to the point that the water is no longer potable, the homeowner cannot be held liable for the contamination in a cost recover action **and** the contamination would simply be left out of the equation of determining the home's fair market value. This argument is neither supported by the statute nor logical in light of the underlying assumption in determining fair market value; a willing seller and a willing buyer.

Finally, Appellee's arguments relating to the statutory scheme of the UCPA ignore several significant legal principles. Initially, a procedural statute (the UCPA is a procedural

statute, MCLA 213.52(1)) cannot be applied in such a manner as to alter a party's substantive legal rights. *Tobin v Providence Hospital*, 244 Mich App 626; 624 NW2d 548 (2001). Further, the Michigan Constitution is a limitation on the Legislature's power, not a grant of power to it, *Federated Publication v MSU Bd. of Trustees*, 460 Mich 75, 83, 594 NW2d 491 (1999) (citing *Advisory Opinion on the Constitutionality of 1976 PA 240*, 400 Mich 311, 317-318, 254 NW2d 544 (1977)) and the enforcement of statutory provisions must give way to constitutional guarantees. Here, no matter how Appellee asks this Court to interpret the procedural scheme of the UCPA, the Court cannot ignore the constitutional guarantee that a property owner is entitled to just compensation, but nothing more, for its property. It is in this manner that exclusion of evidence of contamination is unconstitutional; it results in a windfall to the property owner by requiring the condemning authority to pay **more** than just compensation (fair market value) for property where no cost recovery action will be brought.

Appellee further argues that evidence of environmental contamination is "terribly difficult to factor into a fair market determination" and "beyond the capabilities of real estate appraisers." Appellee contends that unanswered questions regarding environmental contamination would include "the extent of contamination," "the type of cleanup needed," and "when and how the clean up will be funded." In the trial of this matter, however, **both** parties offered extensive expert testimony that addressed all of these issues. *See*, Facts, above. The trial court was provided with complete environmental data. Further, the parties' experts offered opinions as to the affect of the environmental contamination of a reasonably prudent buyer of the property, clean up strategies and associated cost estimates. *Id.*

III. APPELLEE'S ATTEMPT TO RETROACTIVELY APPLY THE 1993 AMENDMENTS OF THE UCPA IS A SHALLOW ATTEMPT TO RE-WRITE THE UNDENIABLE RECORD IN THE TRIAL COURT.

Appellees have disputed Appellant's assertion that the Court of Appeals decision was merely advisory since the date of the take had not been determined by the trial court, calling the argument "groundless" and "bizarre." On the contrary, this argument is far from groundless (and certainly, not bizarre) as the trial court expressly stated that the date of taking was at issue:

> Now, I agree, we've got further complications in this case because we don't even know when the taking occurred, or at least we have to litigate that issue, and there's any number of possibilities between what, a two-year span, something like that.

Transcript, Motion in Limine, p. 6; Appellee's Appendix on Appeal at 9b.

Furthermore, the trial court went on to state that the date of take should be decided separately:

> Well, in any event, we've got a two-year time span and it's either one date or the other date, so we have to figure that out separately.

Id., Appellee's Appendix on Appeal at 9b.

After so stating that such a finding was necessary to the resolution of the just compensation trial, the trial court never determined a precise date of take. Yet, the Court of Appeals decision was premised upon an application of the 1993 UCPA Amendments, and, thus, is only relevant in the event that the date of take occurred subsequent to the promulgation of the 1993 UCPA Amendments. Therefore, the Court of Appeals decision is merely advisory in nature.

Appellees assert that the 1993 UCPA Amendments are applicable regardless of the date of take, arguing that the 1993 UCPA Amendments applied "to all then-pending actions" including a 1992 date of take as alleged by Appellee. *Id.* As support for this proposition the

Appellees cite MCL 213.55(1). *See* Appellee's Brief at 46. MCL 213.55(1) hardly subjects a pending action to the 1993 UCPA Amendments. Rather, MCL 213.55(1) merely states that an agency issuing a good faith written offer prior to 1994 "may" resubmit a new good faith offer that complies with the act:

> . . . If an agency made a good faith written offer pursuant to this section before January 28, 1994 but has not filed a complaint for acquisition of the property, the agency may withdraw the good faith written offer and resubmit a good faith written offer that complies with this act as amended. . .

MCL 213.55(1). As a matter of statutory construction, the statute's use of the word "may" shows that pending actions were not "required" to be subject to these provisions.

Finally, the Appellees fail to recognize that their claim involves an inverse condemnation claim that was initiated by the Appellee. In *Jack Loeks Theatres, Inc. v. Kentwood*, 189 Mich. App. 603 (1991), *vacated in part, appeal denied in part*, 439 Mich 968 (1992), the Michigan Court of Appeals held that "the UCPA has no application to inverse condemnation cases initiated by aggrieved property owners." *Jack Loeks Theatres, Inc. v. Kentwood*, 189 Mich. App. 603, 616 (1991)(citing *Lim v. Dep't of Transportation*, 167 Mich. App. 751, 755 (1998)). Therefore, the 1993 UCPA Amendments are not applicable to the subject inverse condemnation action filed by Appellee.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETTLLP
Attorneys for Plaintiff/Appellant

Dated: August 20, 2002

By: _____

Mark S. Allard (P38164)
Matthew Zimmerman (P33296)
Business Address and Telephone:
333 Bridge Street, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000